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In the Supreme Court of the United States

OCTOBER TERM 1944.

No. 917.....

THE OHIO PUBLIC SERVICE COMPANY,
Petitioner,

v.

THE NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
Sixth Circuit
and
BRIEF IN SUPPORT THEREOF.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 5647

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of The Ohio Public Service Company (hereinafter referred to as "petitioner") respectfully shows to this Honorable Court:

A. SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Petitioner is an Ohio public utility corporation, organized in 1921. It is engaged in the business of generating, transmitting and distributing electrical energy wholly within the State of Ohio. The territory served by it is divided into nine geographical divisions, named for the principal city in each division, to-wit, Alliance, Ashland, Elyria, Lorain, Mansfield, Massillon, Port Clinton, Sandusky and Warren. (R. 3, 18; see Exhibit 2, R. 411, Offered and Received R. 125 and 127.)

Its employees have always received guaranteed monthly or bi-weekly salaries and are not paid by the hour. No deduction is made for excused absences for personal reasons, or absences due to illness. Employees of one year

standing are granted one week's vacation with pay, plus one additional day for each year's service, with a maximum of two weeks' vacation per year with pay. An employee injured in the course of his employment receives his full pay unless such injury has been occasioned by his violation of the safety rules of the Company, in which event he receives the compensation prescribed by the Workmen's Compensation Act of Ohio. In 1941, and at petitioner's expense, the life of each employee was insured in amounts ranging from $500 to $2,500, dependent upon length of service. In 1941 petitioner inaugurated the policy of increasing the salaries paid in January, 1941, accordingly as the cost of living increased as shown by the publications of the United States Department of Labor. At the time of wage stabilization in October, 1942, each employee was receiving at least 17% more salary than in January, 1941. Further increases due to increases in the cost of living were denied by the National War Labor Board under the wage stabilization laws. (R. 247 to 250.) Petitioner never has had and does not now have any agreement with any labor organization.

On March 4, 1943, the National Labor Relations Board, (hereinafter referred to as "respondent"), pursuant to the provisions of the National Labor Relations Act,[1] filed its complaint (R. 3) alleging that from on or about June 1, 1941, and at all times since, petitioner, in operating its Lorain Ohio Division,[2] has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act[3] and committed certain

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[1] Title 29, U. S. C. 151.

[2] There are thirty-one employees in the Lorain Ohio power plant, which is here involved. (R. 32.)

[3] "Sec. 7. Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." Title 29, U. S. C. 157.

unfair labor practices in violation of Section 8, paragraphs (1) and (3) of the Act.[1]

On March 26, 1943, petitioner filed its answer (R. 7) specifically denying the charges made by respondent in its complaint. The matter thereafter came on for hearing on March 29, 1943, before R. M. Denham, Trial Examiner (R. 11), who on April 15, 1943, filed his Intermediate Report. (R. 330.) Exceptions to such report were filed by both the petitioner (R. 358) and Utility Workers Organizing Committee C. I. O. (R. 366.) The Intermediate Report of the Trial Examiner was affirmed September 18, 1943, by the decision and order of the National Labor Relations Board (R. 370).[2] Petitioner's motion filed September 27, 1943 (R. 384), to reopen the record and receive further evidence was denied October 6, 1943. (R. 388.)

A petition to review the decision and order of the National Labor Relations Board was filed in the United States Circuit Court of Appeals for the Sixth Circuit on October 21, 1943. (R. 390.) On December 1, 1943 (R. 402), the respondent filed its answer and request for enforcement of its order of September 18, 1943. On July 17, 1944, the United States Circuit Court of Appeals, without opinion, dismissed petitioner's petition to review and allowed the prayer of the National Labor Relations Board for enforcement of its order. (R. 475; 144 F. 2d. 252.) Petitioner's petition for rehearing, filed August 4, 1944 (R. 477), was denied by the United States Circuit Court of Appeals on November 6, 1944. (R. 485.)

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[1] "Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(3) By discrimination in regard to hire or tenure of employment or by term or condition of employment to encourage or discourage membership in any labor organization: * * *" Title 29, U. S. C. Sec. 158 (1) and (3).

[2] 52 N. L. R. B. 725.

W. B. McCormick, petitioner's superintendent of its power plant at Lorain, employed one Ben F. Thomas in February, 1941, as a guard. At the end of the month he was dismissed as he was over age, but McCormick promised that other work would be found for him. (R. 61, 272.) Thomas then went to work for The National Tube Company at Lorain, where he joined the C. I. O. as that Company had a closed shop agreement. (R. 62.) In June, 1941, McCormick sent for Thomas and reemployed him as a storekeeper. (R. 63.) At the time of reemployment McCormick remarked to Thomas, "I hope you don't belong to that God damned C. I. O." (R. 62), to which Thomas replied that he had joined while at The National Tube Company. (R. 62, 63.) It was found that by this statement petitioner interfered with, restrained and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act (R. 339, 340, 371), notwithstanding the fact that at the time thereof Thomas was given employment and remained in petitioner's employ until February 8, 1943, and despite the fact that no evidence was offered to show that any other employee at any time learned or knew of this conversation or that it was at any time repeated by either McCormick or Thomas.

In August, 1942, another employee, Cornelius L. Yingling, who had received a letter from the International Brotherhood of Electrical Workers soliciting membership,[1] showed the letter to plant superintendent McCormick and inquired as to what he thought about it. (R. 26.) McCormick replied that he could not tell the boys what to do, that he had to keep quiet on that. (R. 36.) Yingling then pressed McCormick for his personal opinion, whereupon McCormick said, "If they do get a union in here, there

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[1] A. F. of L. in the summer and fall of 1942 attempted organization of petitioner's employees in the Sandusky Ohio Division. See 45 N. L. R. B. 1244. Election ordered was lost by A. F. of L.

would be no doubt but what the Company, the first thing, would do, would take men off of salary and put them on an hourly basis; do away with their sick leave, and would no doubt do away with the insurance policy that the Company holds for the employees." (R. 26, 27.) It was found that by this expression of McCormick's personal opinion petitioner interfered with, restrained and coerced its employees in the exercise of the rights guaranteed to them in Section 7 of the Act (R. 371), and this notwithstanding the fact that Yingling understood the same to be a personal opinion and not an official one (R. 53), and no evidence was offered to show that the conversation was ever repeated or otherwise made known to any other employee.

In paragraph 7 of respondent's complaint (R. 5) it is alleged that petitioner on February 8, 1943, discharged Thomas and Yingling because they were members of and officers in the union and active in behalf of the union, and because petitioner wished to discourage membership in and activities on behalf of the union. Petitioner's witnesses testified that organizational activities began on or about January 30 or February 1, 1943 (R. 30) and were secretly conducted. On Saturday night, February 6, 1943, at a meeting at Yingling's house, Thomas was elected President and Yingling was elected Financial Secretary of the Union. (R. 30, 33, 34.) In an endeavor to show that the petitioner had knowledge of these organizational efforts and of the fact that Yingling and Thomas were elected officers of the Union and, because thereof, were discharged on February 8, 1943, respondent was permitted to show, over objection (R. 78), that shortly after Thomas was employed as a storekeeper in June, 1941, he had a conversation with a fellow employee, Harry Nelson, concerning another employee, Steve Docs. Thomas testified that Nelson told him, "Don't tell Steve Docs anything you don't want Mr. McCormick to know." (R. 88.) Over objection, Yingling was permitted to testify that Docs worked frequently for McCormick at

McCormick's home doing odd jobs. (R. 48.) Respondent's witnesses Thomas, Witte and Heilman were permitted to testify, over objection, that at the union meeting on the night of February 6th the general opinion of the men was that they did not want Docs in the union for the simple reason that nothing would be secret from there on out. (R. 89, 161, 185.) Respondent's witness Heilman, union organizer, was permitted to testify over objection that at the meeting held at Yingling's home on the night of February 6th he told the men that it would be impossible for them to keep their union quiet any longer and that they might as well go after everybody (R. 186), whereupon someone whom Heilman was unable to identify inquired, "Even Docs, the stool pigeon?" to which Heilman replied, "I don't care. Go after all of them." (R. 186.)

The purpose of the foregoing testimony was to show that Docs, who was invited to join the union on Sunday, February 7th, by witness Witte (R. 162), must have told McCormick, the plant superintendent, although no evidence of any kind was offered that Docs actually did carry any tales of any kind. (R. 322.) No evidence of any kind was given to show that the employees were at all justified in their suspicion of Docs or upon what such suspicion was based. The alleged statement of Nelson to Thomas in June, 1941, was not repeated by Thomas to any one so far as the record discloses. The foregoing evidence was clearly inadmissible, particularly in view of the fact that Harry Nelson, who was alleged to have made the statement to Thomas, had left petitioner's employ in October, 1942, and at the time of the hearing was represented by respondent's counsel as being in the army. (R. 81.) Petitioner located Mr. Nelson and procured his affidavit on September 25, 1943, and filed a motion with respondent to reopen the record and permit the testimony of Harry Nelson to be taken. (R. 384.) In this affidavit (R. 386), Nelson denied ever having made the statement attributed to him by

Thomas and said that such testimony on the part of Thomas was wholly false and untrue and that no such conversation ever took place. His affidavit further revealed the fact that when he left the employ of the petitioner in 1942 he went to work for The Warren City Tank & Boiler Company at Warren, Ohio, and that he had never been in the army. (R. 386.)

Respondent denied petitioner's motion to reopen the record and take the testimony of Mr. Nelson, saying that in its findings and conclusions it did not rely upon Mr. Does' alleged reputation as a "tale bearer" and that its conclusions regarding petitioner's knowledge of the union activities of Yingling and Thomas were adequately supported and that its conclusions would in no way be affected by the testimony of Mr. Nelson. (R. 388, 389.)

There is no direct evidence in the record to the effect that on February 8th, when Yingling and Thomas were discharged, the petitioner had any knowledge of any union activities in its Lorain Ohio Division. The conclusion of respondent that petitioner did have such knowledge is based entirely upon inference or presumption. This inference or presumption is then used as the basis of a further inference, to-wit, that because thereof Thomas and Yingling were discharged. This conclusion is reached despite the positive direct testimony of petitioner's witnesses that they had no knowledge of any union activity at the time Yingling and Thomas were discharged, and did not discharge them therefor, but rather discharged them for cause. This positive direct testimony of petitioner's witnesses was brushed aside by the unsupported finding that the causes assigned were trivial and that respondent credits its own witnesses and discredits petitioner's witnesses. The employees Thomas and Yingling were ordered reinstated with back pay. (R. 381, 382.)

The day after Yingling and Thomas were discharged, and on February 9, 1943, the Utility Workers Organizing

Committee filed its charges with the Regional Office of respondent. (R. 1.) Some time later Mr. Heilman, the union organizer, called E. J. Burger, Vice President and General Manager of respondent's Lorain Ohio Division, and requested a conference to talk on behalf of Mr. Witte, an employee. (R. 256.) Mr. Burger then called a meeting of some of the employees of the power plant, including Mr. Witte, at which meeting he stated: "I said that I had been approached from the outside by a person who wanted to represent one of our employees with respect to a grievance. I was very much surprised to have that happen because I felt that every employee of the company knew of the policy of the company that any employee could talk to any of his superiors without retribution or punishment and if there was anything wrong I felt it was to our general mutual benefit to discuss the matter and try to get whatever matters might be wrong cleared up." (R. 257.) Respondent found that these remarks were designed to discourage the employees in their union membership and activities and were in violation of Section 8 (1) of the Act. (R. 371.)

B. JURISDICTIONAL STATEMENT.

Title 28, U. S. C. Section 347, provides:

> "(a) In any case, civil or criminal, in a Circuit Court of Appeals, * * * it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, * * *, to require by certiorari * * * that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

Title 28, U. S. C. Section 350, provides:

> "No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or enter-

tained unless application therefor be duly made within three months after the entry of such judgment or decree * * *."

The decree of the Circuit Court of Appeals, dismissing petitioner's petition for review and granting enforcement of respondent's order, was entered July 17, 1944. (R. 475; 144 F. 2d. 252.) On August 4, 1944, petitioner filed an application for rehearing (R. 477), which was denied November 6, 1944. (R. 485.) The three months specified in Section 350, Title 28, dates from November 6, 1944.

Department of Banking v. Pink (1942), 317 U. S. 264; *National Labor Relations Board v. Mackay Radio and Telegraph Company* (1938), 304 U. S. 333.

The decision of the Circuit Court is one that decides important federal questions probably in conflict with the decisions of this Court and the decisions of other circuit courts of appeals, and has decided an important federal question which has not been but should be settled by this Court. (Supreme Court Rule 38, 5 (b).)

The finding that, by the remark of McCormick to Thomas in June, 1941, "I hope you don't belong to that God damned C. I. O.," followed by Thomas' employment despite his statement that he did belong, petitioner interfered with, restrained and coerced its employees in violation of Section 7 of the Act, is contrary to the decisions of this Court in *National Labor Relations Board v. Virginia Electric & Power Company* (1941), 314 U. S. 469, and *Consolidated Edison Company v. National Labor Relations Board* (1938), 305 U. S. 197. While McCormick's statement evidences a dislike upon his part for the C. I. O., there was no threat of any kind coupled therewith from which any reasonable man could conclude that McCormick or petitioner would in any way discriminate against any member of the C. I. O. In fact, having given Thomas employment after his admission that he did belong can

lead only to the conclusion that, despite McCormick's dislike for the C. I. O., membership in that organization made no difference to management.

Similarly as regards the statement of McCormick to Yingling in August, 1942, to the effect that if a union was organized petitioner would no doubt take the men off salary, put them on an hourly basis, do away with sick leave and the life insurance policy.[1] If this statement had been made *as superintendent* it would no doubt be a violation of Section 7 of the Act, for it contains threats calculated in the mind of any reasonable man to restrain and coerce. But the statement was not made *as superintendent* or in *any official capacity*. When inquired of *as superintendent* as to what he thought of the letter Yingling received from the I. B. E. W., McCormick admittedly said, "Well, I can't tell the boys what to do. I have to keep quiet on that." (R. 26.) It was only when Yingling pressed McCormick for his *personal* opinion that the alleged improper statement was made, and Yingling freely testified that he understood the statement as McCormick's personal opinion and not as an official opinion. (R. 53.) Is an employer to be bound by the personal opinions of his employees? Respondent says that, in view of the nature of the statement and the "authority of the person making it," (R. 371), petitioner violated the Act. We have been unable to find any decision of this Court holding an employer to be bound by the admitted personal opinions of his employees. Such a decision, particularly in view of the provisions of Sections 7 and 8 of the National Labor Relations Act, raises a substantial federal question that should be settled by this Court.

The finding that petitioner violated Section 8 (1) of the Act (R. 371, 372) when Mr. Burger, Vice President,

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[1] McCormick denies having made any such statement. (R. 286.)

said to a group of employees, "I said that I had been approached from the outside by a person who wanted to represent one of our employees with respect to a grievance. I was very much surprised to have that happen because I felt that every employee of the company knew of the policy of the company that any employee could talk to any of his superiors without retribution or punishment and if there was anything wrong I felt it was to our general mutual benefit to discuss the matter and try to get whatever matters might be wrong cleared up" (R. 257), is contrary to the decisions of this Court in the *Virginia Electric & Power Company* and the *Consolidated Edison Company* cases, *supra*. No reasonable mind could conclude that by this statement the employees were in any way threatened with any disciplinary action or discrimination if they chose to seek outside help or otherwise exercise the rights guaranteed to them by the Act. It is another case of a non-intimidating, non-coercive statement being held to be violative of Sections 7 and 8 of the Act.

The conclusion that Thomas and Yingling were not discharged for cause, but were discharged for their union activities, is not only contrary to the only direct evidence submitted, but is a conclusion of ultimate fact based upon an inference, first that petitioner in some manner learned of their union activities, and second, having learned thereof, discharged them because thereof. Such a conclusion is clearly violative of all rules of proof and is contrary to the decisions of this Court in

United States v. Ross, (1875) 92 U. S. 281;

Pennsylvania Railroad Company v. Chamberlain, (1933) 288 U. S. 333;

Consolidated Edison Company v. National Labor Relations Board, (1938) 305 U. S. 197, 229;

Washington, Virginia & Maryland Coach Company v. National Labor Relations Board, (1937) 301 U. S. 142;

and as well the decisions of the Circuit Court of Appeals in

National Labor Relations Board v. Citizens News Company, (C. C. A. 9th, 1943) 134 F. 2d. 970;

Alexander v. Standard Accident Insurance Company, (C. C. A. 10th, 1941) 122 F. 2d. 995;

Ballston-Stillwater Knitting Company v. National Labor Relations Board, (C. C. A. 2nd, 1938) 98 F. 2d. 758;

Appalachian Electric Power Company v. National Labor Relations Board, (C. C. A. 4th, 1938) 93 F. 2d. 985.

In *United States v. Ross, supra,* this Court said, page 283:

> "It is obvious that this presumption could have been made only by piling inference upon inference, and presumption upon presumption. * * * They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain."

C. QUESTIONS PRESENTED.

1. Was the statement of McCormick to Thomas in June of 1941, at the time Thomas was employed as storekeeper, violative of Sections 7 and 8 of the National Labor Relations Act?

2. Can the personal opinion of McCormick as expressed to Yingling in August, 1942, be considered as an expression of petitioner's labor policy, justifying a finding that thereby petitioner violated Sections 7 and 8 of the National Labor Relations Act?

3. Was the statement of Burger to a group of employees in February, 1943, violative of Sections 7 and 8 of the National Labor Relations Act?

4. Were not the findings that Thomas and Yingling were not discharged for cause, but were discharged for their union activities, contrary to law, in that such findings were reached by placing an inference upon an inference, are not supported by any substantial evidence and are contrary to the only direct evidence submitted?

D. REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The finding that by the statement of McCormick to Thomas in June, 1941, and the statement by Burger to a group of employees in February, 1943, petitioner interfered with, restrained and coerced its employees in the exercise of the rights guaranteed to them under Section 7 and was violative of Section 8 (1) and (3) of the National Labor Relations Act is in conflict with the decisions of this Court in

National Labor Relations Board v. Virginia Electric & Power Company, (1941) 314 U. S. 469;
Consolidated Edison Company v. National Labor Relations Board, (1938) 305 U. S. 197.

2. The finding that petitioner is chargeable with the personal opinion of McCormick, considering the circumstances under which it was made, gives rise to an important federal question which, so far as diligent search has disclosed, has not been but should be settled by this Court. We can conceive of no federal question more important, particularly in view of the National Labor Relations Act, than that here presented, to-wit, "Is an employer chargeable with the personal opinions of his supervisory employees under the National Labor Relations Act?"

3. The finding that Thomas and Yingling were not discharged for cause but were discharged for their union activity is not only contrary to the only direct evidence submitted but is a conclusion of ultimate fact based upon an inference which in turn is based upon an inference, contrary

to the decisions of this Court and as well the decisions of Circuit Court of Appeals referred to *supra*, page 12.

E. PRAYER FOR WRIT.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to The United States Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9664, The Ohio Public Service Company, Petitioner, v. The National Labor Relations Board, Respondent, and that the said judgment of The United States Circuit Court of Appeals and Order and Decision of The National Labor Relations Board may be reviewed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Respectfully submitted,

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